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CURRENT TOPICS.

The Supreme Court of Minnesota recently passed upon the question of the right of a third party to bring an action upon a contract made for his benefit, but to which he is not a party. Say the court: "The decided weight of authority in this country is to the effect that, with regard to contracts not by specialty, the person for whose benefit the promise is made may enforce it, though he be a stranger to the contract and to the consideration. This is inconsistent with the general rule that an action on contract can not be maintained unless there is privity of contract between the parties. But justice would be imperfectly administered if no exceptions were allowed to that general rule. Many trusts arising *ex contractu* would fail. We will not undertake to define the cases in which an exception shall be allowed in favor of the person for whose benefit stipulations in a contract between others are made. One exception recognized by a mass of authorities in this country, too great to be disregarded, is where the contract creates a duty or relation in the nature of a trust; as if A should transfer property to B, and as the consideration, or as part of the consideration, for the transfer B should assume and promise to pay debts of A. In such case the consideration retained might well be regarded as held in the nature of a trust for the persons indicated by the contract. That such persons may maintain an action at law against the person promising, was held in the following among a great number of cases: Morgan v. Overman Silver Mining Co., 37 Cal. 534; Snell v. Ives, 85 Ill. 279; Helmer v. Kearns, 40 Ind. 124; Johnson v. Knapp, 36 Iowa, 616; Anthony v. Herman, 14 Kas. 494; Joslin v. New Jersey Car Co., 36 N. J. L. 141; Thompson v. Thompson, 4 Ohio St. 333; Urquhart v. Brayton, 12 R. I. 169; Hind v. Holdship, 2 Watts, 104; McDowell v. Laer, 35 Wis. 171; Saunders v. Classen, 13 Minn. 379; Campbell v. Smith, 71 N. Y. 26. This is that kind of case, and we hold the action maintainable."

The decision of the New York Court of Appeals in the case of Van Voorhis v. Brintnall, which we print to-day, will be recognized, we believe, by the entire profession as an extremely important precedent upon the subject of the validity of extra-territorial marriages between persons who are rendered incapable of contracting the relation by a statutory provision. We do not, however, see how a contrary conclusion could have been arrived at by the court; for inasmuch as the doctrine that a marriage valid where celebrated, is valid all over the world, is certainly an established principle of the law of nations, a contrary ruling in this case would have produced the anomaly of a marriage, valid everywhere in the civilized world, except in New York. 1 Bishop on Mar. & Div. sec. 352; Stevenson v. Gray, 17 B. Mon. 193, 210; Dannelli v. Dannelli, 4 Bush, 51.

The policy of a law attaching to a party divorced for his own fault, an incapacity to contract a subsequent matrimonial alliance, is plainly subject to the gravest question. It attaches to him individually a personal incapacity which, in the nature of things, can only be known to others constructively; and consequently, to a certain extent, places society at his mercy. Not only this; it affects in the gravest and most serious way the most sacred rights of the unborn and innocent children of such subsequent marriage. It is very doubtful, too, whether any corresponding good is obtained to offset these disadvantages, resulting from the statute. As a means of punishment it is inadequate; and whatever of practical punishment inheres in the enforcement of the rule, falls upon other shoulders than those of the real culprit.

It is said that Guiteau's counsel have determined to abandon both the plea to the jurisdiction and that of negligent malpractice on the part of President Garfield's physicians, thus confining the defense to the plea of insanity.

EVIDENCE OF TRANSACTIONS AND COMMUNICATIONS WITH A DECEASED PERSON AS AFFECTED BY THE INTEREST OF THE WITNESS.

II.

Inasmuch as the rule of incompetency established by the statute is intended for the protection of the estates of decedents, it follows, naturally, and in many of the statutes it is expressly provided, that the representative of the interests of the testator or intestate may waive the statutory incompetency and call the interested party as his own witness. To constitute such a waiver, it is not necessary that he should have been put upon the stand by the deceased's representative; but if after he has been examined concerning indifferent matters in his own behalf, he is asked a question upon cross-examination in relation to a transaction between himself and the deceased, that renders him the witness of the opposite party, and competent to speak to the whole matter.[1] And even where the interested party is called as the witness of the opposite party, it has been held that that fact will not operate to render him competent, unless he is required to testify concerning transactions and communications with the deceased.[2] In determining who is the "opposite party," for the purpose of calling an interested witness, as in settling other questions arising under this statute, the courts look rather to the substance than to the form. Thus where a bill was filed to set up a parol trust in real estate against the heirs and administrators of a deceased person, and an execution-creditor of the complainant who had levied on the property was made a defendant and had filed a cross-bill, it was held that such execution-creditor could not be considered "the opposite party" (referred to in the act of Congress) to call the complainant as a witness; that the opposite party is the party against whom the evidence is sought to be used, and that in this case the interest of the execution-creditor is identical with that of the complainant.[3] And where one sues an assignee upon an account, or upon an account equitably assigned, and makes the assignor a party to answer to his interest, the assignor and assignee are not adverse parties: their interests are identical; and where the cause of action is filed as a claim against the estate of a decedent, the assignor can not testify as a witness for the assignee.[4] And in North Carolina when a party to a suit, who is, *in interest*, really a plaintiff, but appears as a party-defendant on the record, gives evidence as to a transaction with a deceased person, it renders competent the evidence of a co-defendant touching the transaction.[5]

It has been sometimes held that the prohibition of the statute extends only to testimony adverse to the interest of the deceased; that the administrator himself may testify.[6] But where he does so, and speaks to transactions and communications with the deceased, this operates as a waiver of objection to the testimony of the party in adverse interest, and renders him competent.[7] In New Hampshire, where the statute provides that if the decedent's representative testify, then the adverse party may testify; it has been held that, although the representative may have testified to some unimportant and inconsequential facts which might have been shown by other witnesses, and not to communications and transactions with the deceased, yet the opposing party will have the right to go into the whole case and testify to such transactions and communications, and that the discretion of the court will not go to the extent of restraining him.[8] It has already been stated that one of the principal objects of the statute, as interpreted by the courts, is to prevent injustice by the establishment and maintenance of a mutuality of advantage between the parties.

[1] Thomas v. Thomas, 42 Ala. 120; Harper v. Parks, 63 Ga. 705. In Virginia, however, the incompetency of the witness depends upon his testimony being in his own favor and against the interest of the decedent. Burkholder v. Ludlam, 30 Gratt. 255. In Maine, the statute provides expressly that a party in interest may testify, though the opposing party be an administrator or executor, whenever (1) the deposition of the deceased is used at the trial; (2) the executor or administrator testifies; and (3) the representative party is a nominal party. Rev. Stat. Me. 1871, ch. 82, sec. 87, construed in Kelton v. Hill, 59 Me. 259; Jones v. Simpson, 59 Me. 180.

[2] Causler v. Wharton, 62 Ala. 359; Trow v. Shannon, 8 Daly, 239. *Aliter* in Kentucky, Eaves v. Harbin, 12 Bush, 445.

[3] Eslava v. Mazange, 1 Wood, 623.

[4] Ketcham v. Hill, 42 Ind. 64.

[5] Redman v. Redman, 70 N. C. 257.

[6] McIntyre v. Meldrim, 40 Ga. 490.

[7] Ward v. Plato, 23 Hun, 402.

[8] Ballou v. Tilton, 52 N. H. 606. See the Illinois Statute, Hurd's Rev. 1880, p. 505, sec. 2; Donlevy v. Montgomery, 66 Ill. 227.

Of course, cases may be easily conceived, and sometimes actually arise, in which the very injustice and inequality which the statute is intended to guard against, would result from a literal enforcement of its provisions. In these cases, as in others instanced above, the interpretation adopted by the courts is in furtherance of substantial justice. Thus the statute of Congress and of some of the States makes no provision for the case in which a party's testimony has been taken in the form of a deposition, and, after his subsequent death and the substitution of his personal representative, his deposition is read in evidence, and upon offer being made to swear the opposing party, the personal representative objects.[9] It has been held by Judge Dillon, that the effect of reading the deposition of the deceased upon the competency of the adverse party, is similar to that of the personal representative himself testifying to communications and transactions with the deceased, and removes the objection to his evidence.[10] A similar ruling has prevailed in the Supreme Courts of Tennessee[11] and Georgia.[12] And in a New York case, although it was held to be error to permit a party to testify in his own behalf, concerning personal transactions with the testatrix, still the error is cured if the executor afterwards introduced in evidence the deposition of the testatrix concerning the same transaction.[13] And where a contract was made with several parties, and one of the survivors testified in a suit upon it, it was held that the opposing party himself was entitled to be sworn, notwithstanding the fact that one of the several parties is dead.[14]

The prohibition of the statute relates to the time the evidence is offered. If a party is competent at the time he testifies, and his evidence is preserved in the form of a deposition, it will not be rendered incompetent by the subsequent death of the adverse party.[15]

WM. L. MURFREE, JR.

St. Louis, Mo.

9 13 U. S. Stat. 351, sec. 3; 533, sec. 1; Code of Georgia, sec. 3854.
10 Munn v. Owens, 2 Dill. 475.
11 McDonald v. Allen, 64 Tenn. 446; Bingham v. Lavender, 66 Tenn. 48.
12 Monroe v. Napier, 52 Ga. 388; Allen v. Morgan, 61 Ga. 107.
13 Trow v. Shannon, 8 Daly, 239.
14 Hammond v. Drew, 61 Ga. 189. *Contra*, Terry v. Ragsdale, 33 Gratt. 342.
15 Armitage v. Snowden, 41 Md. 121.

LIABILITY OF SERVANT FOR NEGLIGENT INJURY TO CO-SERVANT.

II.

"When the case shall arise in England, the following decision in America (Albro v. Jaquith) upon the subject will be of use," wrote Mr. C. Manley Smith,[1] and when we find that decision thus referred to by a text-writer of such well-established repute,[2] too much attention can not, indeed, be directed to the subsequent cases by which its authority has been repudiated. In Osborne v. Morgan,[3] the latest of these, which also came before the court on demurrer (to a declaration in tort), the material allegations of fact, thereby admitted, were that, while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up, by direction of the corporation, certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent, and the others agents and servants of the corporation, being employed in that business, negligently, and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. "In the case at bar," said Gray, C. J., "the negligent hanging and keeping by the defendants of the block and chains, in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendants' actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be for the injury to his property, and could not include the injury to the person of this

M. & S., 3d ed., 217.
2 And see Dicey on Parties, 465.
3 12 Cent. L. J. 448; 23 Alb. L. J. 408; 20 Amer. L. Reg. 399; 11 Reporter, 841.

plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow-servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence. The fact that a wrongful act is a breach of a contract between the wrong-doer and one person, does not exempt him from the responsibility for it, as a tort, to a third person injured thereby."[4] The ruling of the court below, sustaining the demurrer, was accordingly reversed; nor was this conclusion arrived at without full cognizance of Southcote v. Stanley.[5] "The responsibility of one servant for an injury caused by his own negligence to a fellow-servant," added Gray, C. J., "was admitted in two considered judgments of the same court, the one delivered by Baron Alderson, four months before the decision in Southcote v. Stanley, and the other by Baron Bramwell, eight months afterwards.[6] And, no doubt, it is true, that in Wiggett v. Fox, Alderson, B., did observe that "the only liability is on the servants by whom the act was done, and not upon the defendants;" but this *dictum* was *obiter* and unnecessary to the actual decision, so that it can not well be said to strengthen the position much more than it was strengthened by the subsequent *obiter dictum* of the same judge in Southcote v. Stanley, from which Pollock, C. B., there dissented. On the other hand, we do not consider that the judgment of Bramwell, B., in Degg v. Midland Ry. Co., can rightly be claimed as an authority on the subject. "It may be," he said, "that as the defendant's servants knew the deceased was on the railway, and, because they knew that, were guilty of a wrong to him (the person injured), they were liable to an action. If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing it, drives carelessly and injures that person, the servant may be liable." But, in the first of these observations (*obiter*, also, and qualified by the words "it may be") he was dealing, as was shown by the context, with the assumption that the person injured was a mere wrong-doer, and not in a position of a fellow-servant, while *ex facie* the second observation (undoubtedly valid in itself) has no direct relation to the wrong-doer in that position. It happens, however, that the same learned judge has elsewhere expressly announced his opinion on the subject. For, in his evidence before the House of Commons Committee on Employers' Liability, he said, that a workman "would undoubtedly be able to maintain an action against the fellow-workman who had done the mischief;" and, again, he observed, "it is always to be remembered that, in all these cases of supposed negligence or misconduct on the part of the servant, he would always be liable." And so, too, Brett, L. J., allowed, on the same occasion, that there was "a remedy against the delinquent servant." Nor does the matter rest here alone, for in Swainson v. Northeastern Ry. Co., already referred to *inter alia*, we find Pollock, B., declaring "it is clear that an action would well lie against the driver of the engine, by whose negligent act the death of Swainson was occasioned." This, too, however, like the *dicta* in Wiggett v. Fox and other cases already mentioned, was merely *obiter*; and it is to be observed that Albro's case was not cited, nor does it appear that this question was argued.

Apart from mere contradictory *dicta*,[7] we have now, in addition to the Scottish cases, some express American decisions on the subject, including one by the very tribunal that decided Albro's case, and whatever doubt might have before clouded the subject, has, in our opinion, been dispersed. Osborne's case appears to us to have efficiently answered the reasoning in Albro's, both as to the application to the subject of the principles on which the general doctrine was

[4] Hawkesworth v. Thompson, 98 Mass. 77; Norton v. Sewall, 106 Id. 143; May v. Western Union Telegraph Co., 112 Id. 90; Grinnell v. Western Union Telegraph Co., 113 Id. 299, 305; Ames v. Union Railway Co., 117 Id. 541; Mulchey v. Methodist Religious Society, 125 Id. 487; Rapson v. Cubitt, 9 M. & W. 710; George v. Skivington, L. R. 5 Ex. 1; Parry v. Smith, 4 C. P. Div. 325; Foulkes v. Metropolitan Railway Co., 4 C. P. Div. 267, and 5 C. P. Div. 157.

[5] 1 H. & N. 247.

[6] Wiggett v. Fox, 12 Ex. 832, 839; Degg v. Midland Ry. Co., 1 H. & N. 773, 781.

[7] As to the authority of which, see 11 Ir. L. T. R. 121, and paper by the present writer in 5 Ir. L. T. 288.

founded, and as to the "*res judicata*" point.[8] But, after all, the servant's remedy against his co-servant is practically illusory, "because he is a poor man and can not meet his liability," as Brett, L. J., puts it, and because of the difficulty in most cases in determining on what servant in particular the duty was imposed for the breach of which the liability would arise; for, as the Lord Justice-Clerk observed in Stewart v. Coltness Iron Co. and Dewar,[9] "the manager throws it on the oversman, the oversman on the fireman, the fireman on the drawer, until, however gross or glaring the neglect, it is impossible to fix liability on anyone." By the way, in Scotland, also, not only has the party injured an action against the servant, but the master, if found liable in damages, is entitled to relief against the servant.[10] So, it has been held in America that if a proprietor has been compelled to pay damages on account of the negligence of a contractor, he may recover the amount from the latter.[11] And so, said Brett, L. J., in his evidence before the House of Commons Committee, "if the master is made liable for the delinqnency of a servant who is able to pay, although the master is liable, I apprehend that the servant would be liable over to the master if it was the fault of the servant, and not of the master." With this digression we shall conclude, only regretting, withal, that the suggestion made by Mr. Meldon, Q. C., in his draft report for the committee of 1877, was not received in time for their consideration, that if the servant's remedy against his coservants "does not at all exist, or if it is at least doubtful whether or not it does exist, the remedy should be provided in some cases by legislative enactment." — *Irish Law Times.*

[8] See Winterbottom v. Wright, 10 M. & W. 115.
[9] 4 Rettie, 952.
[10] Ersk. 3. 3, 16; Stephen's N. P. 2,337-38.
[11] Pfau v. Williamson, 63 Ill. 16.

THE RIGHT OF A JUDGE OR JURY TO QUESTION A WITNESS.

It has been somewhat a discussed point, with modern commentators upon the Roman law, whether a judge may, or may not, interrogate a witness upon points which are designed for his own information, or which counsel have advertently or inadvertently overlooked. On the one hand it is often insisted that the judge is, or ought to be, confined to the testimony elicited by the parties, of whatever nature it may be. But, on the other hand, it is argued with equal force, that it is preposterous for a judge not to have the privilege of questioning a witness, and thereby ascertaining the truth. The practice is at the present time, both in England and the United States, for the judge to use his discretion; and he seldom hesitates to use it for the purpose of interrogation, if he thinks the ends of justice will be advanced thereby. And for this purpose a witness may be recalled by the judge.[1] Nor is the court, when such discretion is exercised, bound by the rule prohibiting leading questions.[2] An answer not in itself evidence, brought out by a question from the court, may be a good ground for reversal.[3] In a New York case it was held, where the defendant called the plaintiff as a witness, and in reply to a question put by the court, new matter was introduced, which carried it beyond the point which was first brought out, it was held the defendant was entitled to offer himself as a witness to reply to such new matter.[4] In a case tried before a jury, if the judge asks some question which would bring out new facts, which had been omitted by counsel, it would seem that the authority of the judge might be questioned; but in the trial by the court itself, he should be allowed to bring out such matter as he thinks will better enable him to understand and arrive at the true gist of the case. Usually a juror is allowed to ask a witness a question; and as to whether a party may take exception, sometimes becomes a question of importance. A New York case, upon the point under consideration, is well considered and should be conclusive. There a juror put a question to a witness, and it was answered without objection by either party. But upon a repetition of the question, one of the parties objected to it; and on appeal, when this

[1] Middleton v. Barned, 4 Exch. 243; Commonwealth v. Gallavan. 9 Allen, 271; Epps v. State, 19 Ga. 102.
[2] Palmer v. White, 10 Cush. 321.
[3] People v. Lacoste, 37 N. Y. 192.
[4] Meyers v. McCarthy, 2 Sandf. (N. Y.) 399.

question was urged as a ground of error, the court said: "I have not been able to find any authority for the responsibility of a party for a juror's improper question; one has as much right to except to it as the other, and neither has the power to withdraw it. It would be rather hard to make either party suffer for the illegal questioning of a juror. A more appropriate remedy would be to move to strike out the answer, or to call upon the court to direct the jurors to disregard it. But in this case the defendants were too late with their objection, after allowing it to be asked and answered once without objecting to it."

A. G. McKEAN.

Ann Harbor, Mich.

LIMITATIONS—PAYMENT BY JOINT DEBTOR.

NAT. BANK OF DELAVAN v. COTTON.

Supreme Court of Wisconsin, September 27, 1881.

1. In the absence of any statute to the contrary, payment by one joint debtor will remove the bar of the statute of limitations as to all, on the ground that each joint debtor is the agent of all the rest for making such payment.

2. Section 4248, Rev. St., provides that no one of several joint contractors shall lose the benefit of the provisions of that chapter relative to the limitation of actions, "so as to be chargeable, by reason only of any payment made by any other or others of them." B and G, being jointly indebted on a note to X, and also jointly indebted to Y, agreed with each other that B should pay a certain sum on said note to X, and G a like sum on the indebtedness to Y; and the payments were made accordingly, before the statute had run upon said note. *Held*, that such payment upon the note by B during the life of G, pursuant to such agreement, removed the bar of the statute as to G, and as to his personal representatives after his death.

3. The fact of such payment *held* to be established by the evidence (stated in the opinion), notwithstanding a contrary finding by the judge of the court below.

Appeal from Circuit Court, Walworth County.

Fisk & Dodge, for appellant; *S. J. Todd*, *Bennett Sale*, and *R. S. Spooner*, for respondent.

ORTON, J., delivered the opinion of the court:

The findings of fact by the circuit court upon which the judgment was rendered for the defendant in this cause are, substantially, that no payment was made upon the note in suit after the sixth day of January, 1873, by Patrick Gormley, before his death, the ninth day of January, 1879, or by any one authorized thereto in his behalf; and that the debt mentioned did not accrue within six years next prior to his death; and that Patrick Gormley did not undertake or promise to pay said debt within said six years. The conclusion of law was, of course, that the cause of action was barred by the statute of limitations. The only question which need be determined on this appeal is one of fact—whether Patrick Gormley, in his life-time, made any payment upon said note after the sixth day of January, 1873, or by any one authorized thereto in his behalf. Being of the opinion that the finding of the circuit court upon this question was clearly erroneous, other exceptions in the record need not be considered.

Patrick Gormley and one A. H. Barnes were jointly liable to pay this note, together with other indebtedness to the plaintiff, of the firm of S. Atwater & Co., which they had assumed on the dissolution of said firm. D. B. Barnes testified that A. H. Barnes and Patrick Gormley told him that they had made an arrangement and agreement whereby A. H. Barnes was to pay $600 on this note, and Patrick Gormley was to pay a like sum to one George Cotton, for which they were also jointly liable to the plaintiff, and then testified positively and of his own knowledge that A. H. Barnes paid, of the $600 to be paid on this note by said agreement, the sum of $585 on the 11th day of September, 1875, and that he informed Gormley that it had been so paid, and it was in evidence that Patrick Gormley paid Cotton $600, according to said agreement. Cotton testified that he understood that such was the agreement from information derived from both A. H. Barnes and Patrick Gormley, and that Gormley paid him the $600; but he testified further that he thought this arrangement was made in 1877, but he modified his testimony as to the date by saying that it was made when the second year's interest was due on his claim, and exactly when that was the evidence is silent, except that his claim was due in two years from June, 1871, which, by inference, would make the second year's interest due at that time, or in June, 1873, and the date of the arrangement at that time, instead of the year 1877, or in 1876 or 1877, and it is uncertain which. The witness D. B. Barnes was connected with the bank, owning and holding this paper, and was in a condition to know positively when this payment was made. The witness Cotton speaks from vague and uncertain recollection as to the time when he was informed, simply concerning the arrangement by which the payments were to be made, and then changes his testimony to correspond with an event which inferentially makes its date 1873, 1876, or 1877, and he does not pretend to know when the $585 of the $600 agreed to be paid by A. H. Barnes to the bank was actually paid. But if this payment was in 1877, it was within six years from 1873, the time of the previous payment of $600.

The testimony of D. B. Barnes appears to us to be conclusive that this $585 was paid on the eleventh day of September, 1875. The testimony is equally clear as to the manner in which this payment was made. It was by an arrangement and agreement between A. H. Barnes and Patrick

Gormley, and by the request and direction, and with the consent and acquiescence, of Gormley. These are unquestionably the facts of the case, and the finding of the circuit court on this question of fact is clearly against the evidence. The questions of law arising upon these facts are well settled. In the absence of any statute to the contrary, payment by one joint debtor will remove the bar of the statute as to all, on the ground that each joint debtor is the agent of all the rest for making a payment which all are bound to make. This is the law by a clear weight of authority. 2 Parsons, Notes and Bills, 658, and notes *p* and *q*. But by our statute (sec. 4248, Rev. St.), "no one of them shall lose the benefit of the provisions of this chapter (on limitations of actions), so as to be chargeable by reason only of any payment made by other or others of them." The remaining question of law, therefore, is whether the payment of the $585 on this note, in the manner, and under such circumstances, removed the bar of the statute as to Patrick Gormley.

In Winchell v. Hicks, 18 N. Y. 558, where sureties on a joint and several note were called upon for payment, and they directed the holder to call upon the principal for payment, and the principal made a payment on the note, it was held such an acknowledgment of liability as to arrest the running of the statute against him. In Huntington v. Ballou, 2 Lansing, 120, where the maker made payment of interest on the note, reciting in the receipt that it was made by an accommodation indorser, by the hand of the maker, and the indorser, when afterwards shown the receipt by the holder, examined it and expressed his approval of it, it was held that the payment took the case out of the statute, as to such indorser. It is said in the opinion that "the holder had the right thereafter to suppose that the payment made by the maker was so made with the full understanding and arrangement that it should be so made for the indorser." This holding was approved and the judgment affirmed in the First National Bank of Utica v. Ballou, 49 N. Y. 155, and in this case it was also held that the requirement of the statute that an acknowledgment or promise to take a case out of the operation of the statute must be in writing, does not alter the effect of a payment of principal or interest, and prescribes no new rule of evidence as to the fact of such payment, which may be proved by oral admissions of the debtor, and such payment may be made by an agent, and the authority of the agent may be proved by parol evidence. The case of Harper v. Fairley, 53 N. Y. 442, depended on the question whether the maker of the note had knowledge of the payment made upon it by another, and assented to it or authorized it, and is not in conflict with the above cases in any respect. In Pitts v. Hunt, 6 Lansing, 146, it is held that money paid by one of two persons jointly indebted on contract, at the request of the others, stops the running of the statute as to both. In Whipple v. Stevens, 2 Foster (N. Y.), 219, it was held that where the surety made a payment upon the note in the presence of the principal, and the principal did not expressly dissent and said nothing, the principal tacitly assented to such payment, and the payment stopped the running of the statute as to both the principal and surety. These authorities are more than sufficient to make the payment of the $585 on this note by the hand of Barnes, according to such agreement between him and Gormley, a payment by the request and with the assent of Gormley, and in law a payment by both Barnes and Gormley jointly. This payment having been made within the six years next after the sixth day of January, 1873, and within the lifetime of Gormley, stopped the running, and removes the bar of the statute of limitations as to him and his personal representatives since his death.

The judgment of the circuit court is reversed, and the cause remanded, with direction to that court to render judgment for the plaintiff for the amount of the note in suit, less the payments made thereon.

Cassoday, J., took no part.

LEVY UPON AND SALE OF INCUMBERED PROPERTY—CLOUD UPON TITLE.

MESSMORE v. HAGGARD.

Supreme Court of Michigan, October 5, 1881.

A judgment creditor who, having caused execution to be levied and sale made of the lands of his debtor, proceeds to contest a prior mortgage thereof as fraudulent and without consideration, of which mortgage he had actual notice at the time of the levy, but caused no notification to be made at the sale of his intent to control the mortgage, will be held to have purchased subject to it.

Appeal from Kent, in chancery.

E. T. Miller, for complainant; *Grove & Harris* and *Hughes, O'Brien & Smiley*, for defendants.

COOLEY, J., delivered the opinion of the court:

This is a bill in equity to remove a cloud upon title. The following is a summary of the facts as they are set forth in the bill: In March, 1875, the defendant, John Haggard, was the owner of certain parcels of land in the township of Nelson, Kent County, comprising in all 240 acres, and had the record title thereto. While so the owner, he became indebted to complainant and also to S. D. Clay for professional services. On May 13, 1875, John Haggard mortgaged all the lands to his co-defendant Francis Haggard for the nominal consideration of $3,000; but the bill avers that there was no real consideration whatever therefor, and that it was executed for the purpose and with the intent of defrauding complainant and Clay in the collection of their demands. Complainant took an assignment from Clay, and on September 17, 1875, commenced suit against John Haggard and

attached the lands. September 22, 1877, complainant obtained judgment in this suit for the sum of $567.16 and costs taxed at $88.77. Subsequent to the attachment, releases were given by John to Francis of certain portions of the mortgaged lands, and the bill avers that these were executed with the like intent to defraud. On January 19, 1878, complainant caused all the lands to be sold on an execution issued upon said judgment, and they were struck off to him as purchaser for the sum of $716.10, and on May 5, 1879, after the time for redemption had expired, they were conveyed to him by the sheriff in completion of the sale. The bill further shows that the mortgage from John to Francis was recorded immediately on its execution, but avers that its existence was only discovered by complainant after he had become purchaser of the lands at the execution sale. The prayer of the bill is that the mortgage and releases be decreed to be altogether fraudulent and void as against complainant, and that the said Francis be required to release.

The answer of the defendants denies all fraud, and insists that the mortgage from John to Francis was given in good faith, and for full consideration of money loaned. Issue was taken on the answer, and the case heard on pleadings and proofs. The circuit court made a decree in favor of complainant, in conformity with the prayer of the bill. It appears from the record that the complainant established the indebtedness, the judgment, the sale and conveyance by the sheriff, but the proofs negative the allegation of the bill that the mortgage came to the knowledge of complainant after the sale was made. The complainant himself testified that he knew of the mortgage while his suit at law was pending, and narrated a conversation he had concerning it with one of the defendants before the judgment was obtained. Upon the question of good faith in giving and receiving the mortgage we find in the record a large amount of evidence, very contradictory in its nature. The evidence of the defendants is very circumstantial and positive that the consideration was full and *bona fide*, but the complainant insists that it is overcome by various circumstances of improbability and suspicion, which he points out as surrounding the transaction as it is described by defendants.

The questions arising upon the record are—First, whether the alleged fraud is established; and if so, second, whether in respect of such fraud the law will grant to the complainant the relief he seeks. The second may properly be considered first, in view of the serious conflict of evidence in respect to the fraud. It is not denied on the part of the defendants that when complainant discovered the existence of the mortgage, some proper remedy was available to him for the purpose of testing its *bona fides*, and having it declared inoperative against his judgment if he could establish the fraud. The steps usually taken in such cases are, first to levy the execution, and then file a bill in aid. Williams v. Hubbard, 1 Mich. 446; Pushby v. Maudigs, 42 Mich. 172; Pursel v. Armstrong, 37 Mich. 326; Cole v. Tyler, 65 N. Y. 73; Hecht v. Koegel, 25 N. J. Eq. 135; Lewis v. Lamphere, 79 Ill. 187; Wallace v. Treakle, 27 Grat. 479; Lindley v. Cross, 31 Ind. 106. A decree for complainant on such a bill would have relieved the title of the cloud which the recorded mortgage cast upon it, and the sheriff would then have been able to offer an unincumbered title to purchasers. Defendants insist that this was the only course open to complainant, and that he was not at liberty to have the land sold in its apparently incumbered condition, and file a bill to set aside the incumbrance afterwards. The point has never before been distinctly presented in this State, though, since the decision in Cleland v. Taylor, 3 Mich. 202, it has perhaps been assumed that the right to question the *bona fides* of any conveyance by the judgment debtor was as much assailable to the creditor after he had caused the land to be sold on execution and become the purchaser, as it was before. In that case the debtor had made an absolute conveyance, and the creditor, without proceeding to have the conveyance set aside, had become purchaser at the execution sale, and then brought ejectment. The defendant in ejectment questioned the right to inquire into the fraud in a court of law for the purpose of avoiding the deed; but the court, citing and relying upon Jackson v. Myers, 18 Johns. 425; Jackson v. Parker, 9 Cow. 73; Jackson v. Zimmerman, 7 Wend. 436, and 12 Wend. 299, and Stephens v. Sinclair, 1 Hill, 143, decided that it was as competent to set aside the fraudulent deed by suit at law as by bill in equity, and that ejectment by the purchaser at the execution sale was a suitable proceeding for the purpose. There are numerous decisions in other States to the same effect, and we do not question their authority. But the case of Cleland v. Taylor, and the others referred to, have little analogy to this. In those cases the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it and take his measures accordingly. So would all persons who should be inclined to become bidders at the sale understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt, it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed, but as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would obviously be unimportant.

In this case the situation was altogether different. The judgment debtor had only mortgaged his lands, and an interest remained in him which was subject to execution sale without questioning the mortgage. There is no doubt the judgment creditor might proceed to have this interest sold; and if he might also sell the complete title with

the right to have the mortgage annulled afterwards, we must see whether he did the one or the other in this instance. On this point the bill is silent, but the silence itself seems to us altogether conclusive against the complainant's case. It does not appear by the bill that the sheriff, in any of his actions, questioned the validity of the mortgage; it does not appear that he offered to sell anything beyond the judgment debtor's apparent interest in the land; it does not appear that at the time of the sale anything was said or done that would have apprised Francis Haggard, the mortgagee, that the right to contest the mortgage was involved in the sale, or that would have given one coming there in the character of a bidder to understand that something besides the equity of redemption was being sold. A stranger to the judgment purchasing under such circumstances would have purchased the equity of redemption only; for he would have bid for nothing else, and would have offered and paid only what he considered the equity of redemption worth to him.

It can not plausibly be claimed that the law will suffer the judgment creditor to occupy any more favorable position as bidder at his sale than do all other persons. Judicial sales are required to be public, for the purpose of inviting full and free competition, with the primary object of producing for the benefit of parties concerned as large a price as public bidders can secure for them. A secondary object is to give all who may desire the property an equal opportunity to compete for it. But full and free competition implies that all parties have equal knowledge of the state of the title, and the policy of the law is defeated if some one party may bid with such advantages as render competition impossible. But nothing can be plainer than that, if the judgment creditor could bid with the secret assurance that he was to have an unincumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question. Not only would this be unfair to other bidders, and for that reason inadmissible, but it would be particularly unfair to the mortgagee. When the sale appears to be of the equity of redemption only, the mortgagee has no occasion to trouble his mind about it; but if he were distinctly notified that it was made in hostility to his mortgage, he might, even if conscious of his good faith, prefer to redeem rather than to encounter the risks of litigation. This would be his legal right, and it can not lawfully be taken from him through a secret understanding between the officer and the creditor of which he has neither actual nor implied notice. It is true that if the defendant, Francis Haggard, has knowingly accepted a fraudulent mortgage and becomes a loser thereby, he is entitled to no sympathy; but even voluntary fraud does not put one's interests out of the protection of the law, or entitle the party defrauded to confiscate them. A fraudulent conveyance is good as between the parties (Cleland v. Taylor, 3 Mich. 203; Miller v. Babcock, 29 Mich. 526; McMaster v. Campbell, 41 Mich. 513); and even creditors are not permitted to assail it except by judgment and execution (Fox v. Willis, 1 Mich. 321); and there may be equities between the parties which will support a mortgage, void as to creditors, when the creditors do not attach it by proper proceedings.

While, therefore, the complainant had an undoubted right to have the *bona fides* of the mortgage tested before sale, there can be no equity in permitting him to purchase the land apparently subject to the mortgage, and to have its lien annulled afterwards. He has a right to reach his debtor's property, and have it sold for what it will bring at a fair and open sale; but he has no claim to speculate out of his debtor's fraud, and by using the mortgage to keep others from competing, obtain the property for so much less than its value. A purchase under such circumstances must be held to be, what it appeared to be at the sale—a purchase subject to the mortgage. These views render the question of fraud in taking the mortgage unimportant.

The decree, so far as it directed a release of the mortgage, is erroneous, and must be reversed with costs of this court. As the releases by John to Francis Haggard were subsequent to the levy of the attachment on the lands, they could not have affected the complainant's right to redeem from the mortgage, and a declaration of their invalidity seems therefore unimportant. Complainant can, however, if he deems it material, embody in the decree a provision that the releases are inoperative as against his right to redeem.

The other justices concurred.

MARRIAGE—VALID WHERE CELEBRATED — CONFLICT OF LAWS — STATUTORY INCAPACITY.

VAN VOORHIS v. BRINTNALL.

New York Court of Appeal, October 11, 1881.

A man, resident in New York, having been divorced on account of his adultery, purposing to be married again, his former wife being still alive, went with his intended, also a resident of New York, to New Haven, Connecticut, with the purpose of evading the operation of the New York statute, which rendered him incapable of contracting a second marriage during the life-time of his divorced wife, and there the ceremony was performed, and the parties returned to New York to reside: *Held*, that the marriage being valid in Connecticut must be *held* valid everywhere, notwithstanding the intent to evade the statute.

C. W. Stephens, for plaintiffs and Sarah A. Brintnall; *D. M. Porter*, for Rose Van Voorhis

appellant; *R. Busteed, Jr.*, for respondent; *R. Busteed*, guardian, *ad litem*.

DANFORTH, J., delivered the opinion of the court:

By this action the plaintiffs seek a construction of the will of Elias W. Van Voorhis, deceased, and an adjudication as to the right under it of the defendant Rose Van Voorhis. The questions turn upon these facts: The testator died in 1869, leaving a widow and three children—Elias, Sarah and Barker. The widow and Elias were appointed executors. By the will a specific devise was made to his wife, and the residue of the estate given to the executors in trust, "so long as his wife should live," for the accumulation of income and the payment by them as therein directed. By its second clause two-ninths part of this income was to be paid for the benefit of Barker, as follows: Four hundred dollars annually for the support of Ella Van Voorhis, and the same amount for the support of Elias William Van Voorhis, children of Barker, until they should respectively reach the age of twenty-one years; the remainder of said two-ninths to Barker. Before the commencement of this action Ella reached the age of twenty-one years. The sixth clause of the will provided that, upon the death of the testator's wife, all his property should be divided equally between his children above named, share and share alike, and the issue of any deceased child should take the share his, her or their parent would have taken if then living. Elizabeth was then the wife of Barker, and mother of Ella and Elias, his children. Afterward, on the 19th of April, 1872, in consequence of the proceedings begun by her, the Supreme Court of this State dissolved the marriage of Elizabeth and Barker, on the ground of his adultery, and also adjudged that it should not be lawful for him to marry until her death. That event has not happened; but on the 10th of June, 1874, he married Ida Le Baron Schroeder, at the city of New Haven, in the State of Connecticut. Both parties then resided in this State, and the trial court found as a fact "that they went to New Haven for the purpose of evading the New York law, for the reason that the said Barker Van Voorhis was prohibited from marrying again in this State." On the same day they returned to New York and continued to reside there until the death of Barker in 1880. Defendant Rose Von Voorhis was a child of that marriage, born in this State, April 2, 1875. The trial court also found that the marriage was valid under the laws of Connecticut; but, from the facts above stated, that it was null and void by the laws of this State. Rose therefore was adjudged illegitimate and not entitled to take under the will. It was also declared that the two-ninths of the income appropriated for the benefit of Barker (after deducting $400, annually, during the minority of Elias), was undisposed of, and went by force of the statute of distributions to Elizabeth, his former wife, and her children. The plaintiffs, and Elias Van Voorhis and Sarah Brintnall, defendants, appealed to the general term of the Supreme Court, where the judgment was affirmed. They now appeal to this court.

The plaintiffs and the defendant Sarah Brintnall object to so much of the judgment as disposes of the income set apart by the second clause of the will. They insist that Elizabeth, the former wife of Barker, has no concern with it. On the contrary, they say it should go to the testator's son, Elias, Sarah, his daughter, each taking one-third, and the remaining third to the children of Barker. This question was not presented by the complaint as one concerning which the executors had any doubt, and they now claim that it was, by inadvertence, passed upon by the trial court. It would seem, therefore, that the attention of that court should have been called to it in some other way than by exception and appeal. As the case stands, there is such a defect of parties as would make unavailing our decision, if it should accord with the plaintiffs' views. Elizabeth, the mother, is not before us, and would yet have a right to be heard. Whether one released without fault on her part from the obligations of marriage may, upon the death of her former husband, have a share of his personal estate, and if so, whether it is to be measured by its condition at the time of divorce or at his death, should not be determined in her absence. Our conclusion, however, upon the remaining question will lead to a new trial, and in the meantime such steps can be taken as the parties think fit to complete the record.

That question involves the civil status acquired by Barker Van Voorhis and Ida by the marriage in Connecticut. First. It is a general rule of law, that a contract entered into in another State or country, if valid according to the law of that place, is valid everywhere (The King of Spain v. Machado, 4 Russ. 225; Potter v. Brown, 5 East, 130; Story Conflict of Laws, sec. 242); and this, says Kent, 2 Com. 454, is *jure gentium*, and by tacit assent;" and Lord Brougham, in Warrender v. Warrender, 2 Cl. & Fin. 529-530, declares that the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate* but *ex debito justitiæ;* and, according to the case in hand, the rule recognizes as valid a marriage considered valid in the place where celebrated (Story Conflict of Laws, secs. 69, 79; Connelly v. Connelly, 2 Eng. L. & Eq. 570). "We all know," says the court in that case, "that in questions of marriage contract, the *lex loci contractus* is that which is to determine the status of the parties," and also declares that this, by consent of all nations, is *jus gentium*. In Dalrymple v. Dalrymple, 2 Hagg. 54, it was held that a marriage good in Scotland, though otherwise by the laws of England, are valid in that country; and this was put upon the ground that the rights of the parties must be tried by reference to the law of the country where they originated. In Scrimshire v. Scrimshire (2 Hagg. 395), the same principle is stated in different words. The court says:

"All parties contracting gain a forum in the place where the contract is entered into." Warrender v. Warrender, *supra;* Lacon v. Higgins, L. Don. & R. 38; Butler v. Freeman, Amb. 303. Not only is this the result of English decisions, but is believed to state the principle upon which the courts of many of our sister States have acted (Greenwood v. Curtis, 6 Mass. 358; Medway v. Needham, 16 Id. 157; Parton v. Hervey, 1 Gray, 119; Putnam v. Putnam, 8 Pick, 433; Dixon v. Dixon, 1 Yerg. 110; Stevenson v. Gray, 17 B. Monroe, 193; Fornskill v. Murray, 1 Bland Ch. 479), and by which our own with few exceptions, have been governed. In Decouche v. Savetier (6 Johns Ch. 210), Chancellor Kent says: "There is no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci*." In Cropsey v. Ogden (11 N. Y. 228), Johnson, J., says (p. 236): "By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated." The court had before it the case of one who, having a former wife living, from whom he then had been divorced for adultery by him committed, married a second time in this State. His last marriage was held to be void under our statute prohibiting a second or other subsequent marriage by any person during the lifetime of any former husband or wife of such person. Here the former marriage, his adultery and the existence of his first wife, established the condition or quality of the man. They were facts in his history, and brought him within the terms of our law. The general rule above stated was applied. The *lex loci* governed. But the court said it was necessary for them to consider what would have been the effect of a marriage celebrated out of this State. Its attention was, however, directly brought to the statute relating to marriages, and the circumstances under which the remarks above quoted, and others seeming to discriminate between a marriage in this State and out of it, were made, render them the more significant. In Haviland v. Halstead (34 N. Y. 643), a person divorced for the same offense in this State, promised in New Jersey to marry the plaintiff. He married another, and an action for the breach of this promise was brought here, and failed. The parties resided in this State and contemplated the performance of the contract here. The court carefully distinguish the case so presented from one where a marriage had taken place in a foreign State. They assume that the latter would be treated as valid, although the parties had gone there with intent to evade the laws of this State, and citing Medway v. Needham, *supra*, say the doctrine "in favor of marriage so contracted is founded on principles of policy, to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live." Indeed, the general doctrine is so well settled by the decisions of all courts and the reiteration of text-writers, as to become a maxim in the law, that one rule in these cases should be followed by all countries; that is, the law of the country where the contract is made. Story, *supra*, 84; 2 Kent Com. 91, 92. There are, no doubt, exceptions to this rule. Cases, first, of incest or polygamy coming within the prohibitions of natural law. Wightman v. Wightman, 4 Johns. Ch. 343; Hutchins v. Kimmell, 31 Mich. 133; Story, *supra*, sec. 113, 7th ed. Second, of prohibition by positive law. It is contended by learned counsel for the respondent that the judgment may be upheld upon the ground that the marriage is one of the latter class. The assertion, however, is left unsupported by argument or the citation of authorities. Its truth is not so self-evident as to dispense with either, and the omission, coupled with our own examination, leaves us to think that the courts have not yet spoken with a controlling voice in its favor. It is to be maintained, if at all, upon the prohibition in the judgment of divorce already referred to, and the provisions of the statute which made the judgment proper. Graves v. Graves, 2 Paige, 62. The question is not one of ethics or morality, but the extent of the authority of the statute as a rule of conduct. As a direct inquiry it is here for the first time. There are *dicta* and expressions having relation to it in Cropsey v. Ogden, and Haviland v. Halstead (*supra*), tending to confine the effect of the statutory prohibition and declaration of invalidity to second marriages within this State; but in neither case was the precise question before the court for judgment. In other courts of this State it has met with differing answers. In the Supreme Court, First Department, (Marshall v. Marshall, 2 Hun, 238, by a divided court, and Thorpe v. Thorpe, Superior Court of the City of New York, following it.) a marriage under similar circumstances was held void. The judgment now before us went upon the principal of *stare decisis*, the court below also following Marshall v. Marshall, *supra*. Kerrison v. Kerrison, Special Term, Fourth Department (18 Abb., N. C.), and Matter of Webb (1 Tucker, 372), Sur. Ct., are to the contrary. To the latter class may be added Porsford v. Johnson, before Nelson and Betts. JJ., 2 Blatchford, 51. These decisions are irreconcilable, and any determination reached by us must overrule one class or the other. We are therefore at liberty to treat the subject as *res integra*, unaffected by any paramount authority, although greatly assisted by the reasoning of the learned judges who have taken part in those judgments.

The statutory provisions relied upon by the respondent are found in part 2, ch. 8 of the Revised Statutes, entitled "Of the domestic relations," and especially in those articles which treat "of husband and wife." Tit. 1, arts. 1 to 5, vol. 2, p. 138. The statute does not define marriage or introduce a new formula for the relation, but treats it as existing, and declares it shall continue "in this State" a civil contract. Sec. 1, ch. 8, tit. 1,

art. 1, part 2, adopts the principles of the common law which renders invalid marriages between persons connected by certain lines of consanguinity (sec. 8, Id.), or who, for want of age or understanding, are incapable of consent, or who, if capable, have been induced to give it by fraud or force. See. 4, Id. It then declares that no second marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless the marriage with such "former husband or wife shall have been dissolved for some cause other than the adultery of such person; and that every marriage contracted contrary to this provision shall be absolutely void." Sec. 5, Id. These circumstances are restated as grounds of divorce, and it is enacted that "whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant." Sec. 49, Id., art. 3. As originally enacted, the same statute (tit. 1, *supra*, sec. 2) not only made the consent of parties essential, but limited the class to those "capable in law of contracting," and by its definition excluded males under seventeen and females under fourteen years of age. Although this provision has been repealed, it throws some light upon the legislative intent in devising the system of laws concerning husband and wife. Conditions were annexed, not only to the duration, but the creation of this relation, and the frequency with which it might be formed. Certain persons were declared capable, others incapable of forming it; and still others must submit to its dissolution. In one instance, as in the case before us, it can not be contracted with another while the first co-contractor is living. It is obvious that this last condition is in the nature of a penalty. Wait v. Wait, 4 N. Y. 101; Coni v. Lane, 113 Mass. 471. It forms no part of the relief sought by the injured party, has no tendency toward compensation, nor is it imposed to that end. It is restraint or punishment. West Cambridge v. Lexington, 1 Pick. 505-508; Clark v. Clark, 8 Cush. 386. The fact of adultery is, in the language of the statute, an "offense," the person committing it "a guilty person," and when established by judgment he is said to be "convicted;" he is, in consequence of it, deprived of a natural right or privilege which others enjoy. Moreover, for violating this statutory provision, he is at least rendered liable to fine and imprisonment as for a misdemeanor (2 R. S., Part 4, chap. 1, tit. 6, p. 696, secs. 39, 40), if not for felony, under the provisions of article 2 of the same statute. 2 R. S., p. 687, vol. 2. The opinion of Walworth, Chancellor, went to that extent in Graves v. Graves (2 Pai. 62); and, although People v. Hovey (5 Barb. 121) is to the contrary, the measure of the offense is not now important, and the last case holds to the misdemeanor. To that extent the law is plain. The real question is, whether such a statute furnishes an exception to the maxim "*Leges extra territorium non obligant.*" It is not necessary to assert that the power of the legislature is so limited that no law passed by it would accompany a citizen into other countries, and there control or modify the legal effect of his actions. Nor need we deny that it might be so framed as to affect his person, and subject him in this State to punishment for its violation elsewhere, upon his return to the jurisdiction of our courts. On the contrary, it is to be regarded as settled law that as all persons within its borders, whether citizens or aliens, are liable to be punished for any offense committed in this State against its laws, its citizens may also be punished for acts committed beyond its borders, where there is a special provision of law declaring the act to be an offense, although committed out of the State. Maxwell on Statutes, 119, 128; Cope v. Doherty, 2 De G. & J. 624; 1 Burge Col. & For. Laws, 196. So, also, may an act committed out of the State be made to affect an individual, whether citizen or foreigner, when he comes within its borders and does some other act of which our laws take notice. Nor are examples of legislation effecting these results wanting. The statute defining acts which constitute treason (tit. 1, part 4, ch. 1, p. 657; 2 R. S., sec. 2) illustrates the first. It subjects the offender to punishment, whether the act prohibited is done "in this State or elsewhere." That against duelling is an example of the second. It makes one who, by previous engagement, fights a duel without the jurisdiction of this State, and in so doing inflicts a wound upon any person, "whereof he shall die within this State," and every second engaged in such duel, guilty of murder within this State. And still more in point, as illustrating its manner of expression, where the legislature intends to take cognizance of an act committed outside the limits of the State, or to impress upon the *status* of its citizens a condition of liability for such an act, are the revisions of the statute treating of offenses against "the public peace and public morals." Title 5, part 4, chap. 1, art. 1, vol. 2, R. S. After providing punishments for fighting duels, sending challenges, etc., in the most general terms, excluding no one from its condemnation, but within the general maxim above quoted, having no extra-territorial force, comes a provision which, by its special language, attaches to the citizen, goes with him as he crosses the line of this State, and binds him with an obligation in what place soever he is. "If," it says (sec. 5, Id.), "any inhabitant of this State shall leave the same for the purpose of eluding the operation" of these provisions, and "shall give or receive any such challenge" * * * * without this State, he shall be deemed guilty and subject to the like punishment as if the offense had been committed within this State. And we shall see later a provision similar to this, now forming part of the law relating to marriages in the State of Massachusetts. Another instance well shows by contrast the necessity of a declaration that the arm of the law shall be so extended. In proximity to the

provisions I have quoted, in the next article (sec. 8), is the statute "of unlawful marriages," defining bigamy and declaring its punishment, saying in general terms, "every person having a husband or wife living who shall marry any other person" (with exceptions of no moment here), shall be adjudged guilty of bigamy, providing (sec. 10) that an indictment against any person for a second, third or other marriage herein prohibited, in the county in which he shall be apprehended, and the same proceedings had thereon "as if the offense had been committed therein." Yet there are no enlarging words affixing themselves to the person of the citizen, as in the statute before quoted, or bringing within its purview "a second or other marriage" contracted out of the State; and, therefore, on the trial of one who was indicted for bigamy, the second marriage having taken place in Canada, it was held as early as 1855, by a court presided over by the late Judge W. F. Allen, then a Justice of the Supreme Court, that this statute had no application; that the second marriage was not an offense against the laws of this State, because they had no "extra-territorial force." In like manner, if Barker Van Voorhis had, on his return to this State, after accomplishing his second marriage, been indicted under the statutes to which I have referred, either for bigamy or for doing a prohibited act, it would necessarily follow that the indictment would fail. Yet the words of the statute are general; in themselves they contain no limitation. But we have been referred to no case, and I think none can be found, where such general words have been interpreted so as to extend the action of a statute beyond the territorial authority of the legislature, and it is only by extending it that our courts can take cognizance of acts there committed.

Of the third class, an example is afforded by our statute defining punishment for a second offense. Sec. 8, p. 699, vol. 2, Rev. Stat., part 4, chap. 1, tit. 6. "If any person," it says, "convicted of any offense punishable by imprisonment, etc., shall afterwards be convicted of any offense, he shall be punished" in a mode prescribed. It is evident that these words are general, and taken literally would apply to "any person" committing an offense in or out of the State. Applying the mode of construction contended for by the respondent, nothing more could be necessary. But the legislature show that such is not its meaning. By section 10 they declare that "every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offense which if committed in this State would," etc., "shall upon conviction of any subsequent offense, committed within this State, be subject to punishment in the same manner and to the same extent as if the first conviction had taken place in a court of this State." Thus by implication is expressed the opinion of the legislature that the general words of the eighth section, *supra*, would not meet the case provided for in the tenth section.

In Massachusetts, after a statute extending the prohibition against a second marriage, under circumstances before stated, to inhabitants of that State going out of it to evade the law, it was held that if, in any event, the foreign marriage could be invalidated, it could not be without proof of the intent made necessary by statute. Nor without it could there be a conviction for polygamy. Coni v. Lane, 113 Mass. 458. A similar distinction exists under the English law. In 1 Hale P. C. 662, the case is stated of a woman who married in England, and afterward married abroad during her husband's life. It was held she was not indictable under the statute of the former country for bigamy, for the offense was committed out of the kingdom, and the act did not in express terms extend its prohibition to subjects abroad. It is otherwise, however, in regard to certain offenses committed in other countries by Englishmen against their Government—*viz.*, murder and slave-trading—because the statutes have so provided. Warrender v. Warrender, *supra*. Now if the criminal court has no jurisdiction to punish the act when committed out of the State, how has the civil court jurisdiction to prohibit the doing of the act out of the State. The consequences are the same in either case, and are prescribed by the same statute. Whether a man is punished by fine and imprisonment, or by disgrace to himself and the woman he married—the bastardy of his children—is a difference in degree only. The severer punishment is in the last alternative. Can the court imply the right to inflict it? Can it exist unless given in express language? I think not. The statute does not in terms prohibit a second marriage in another State, and it should not be extended by construction. The mode of construction contended for by the respondent, if applied to the statutes of treason and duelling and the punishment of second offenses, would make useless those provisions which relate to the conduct of a citizen out of the State, or the commission of crime in this State by one convicted in another State. Can they be disregarded, or the legislature charged with useless enactments? On the contrary, we must give weight and meaning to them; to their presence in those laws and their absence in the one of marriages. The difference is essential, and the varying language can not be disregarded. There is first a prohibition broad as in the act before us, wide enough to take in all persons within the State, and prohibiting certain acts—a personal prohibition. Not content with that, the statutes go further and extend the same consequences to those acts when committed out of the State. These provisions are lacking in the law before us. When, therefore, we consider the legislation of this State before referred to, and the general rules regulating the territorial force of the statutes, we can not but regard the omission to provide by law for cases like the present as intentional; but if not, in the language of Lord Ellenborough, in Rex v. Skone (6 East, 518), "we can only say of the legislature,

quod voluit non dixit." This view is sustained by the course of decision and legislation in Massachusetts. In Medway v. Needham (*supra*), the plaintiff sued for the support of certain paupers—one Coffee and his wife—alleged to have their legal settlement with the defendant. The only question on the trial, or the subsequent hearing before the whole court, respected the validity of the marriage. He was a mulatto, and his supposed wife a white woman. They were inhabitants and residents of Massachusetts at the time of their marriage, and the statement is that "as the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island, and were there married according to the laws of that province," and returned immediately to their home. Both courts hold the marriage good. The statute regulating marriages in Massachusetts was at that time like our own, but the court placed their decision upon the general principle that a marriage good according to the laws of the country where it is entered into shall be valid in any other country, Parker, C. J., saying: "This principle is considered so essential that even where it appears that the parties went into another State to evade the laws of their own country, the marriage in the foreign State shall be valid in the country where the parties live;" and referring to the statute which declares second marriages absolutely void, says: "They are only void if centracted within this State." West Cambridge v, Lexington, 1 Pick. 505, involved the rights of infant children of Samuel Bemis, paupers, to public support in that State. The question turned upon the validity of his second marriage. His first had been dissolved for his adultery. Afterwards, and while his former wife was living, he married in New Hampshire, and the children were from that union. The court held that if the marriage had been contracted in Massachusetts, it would be unlawful and void; but that the laws of no country have force outside of its own jurisdiction, and, therefore, one who by reason of his offense against it is disabled from contracting another marriage, may lawfully marry again in a State where no such disability is attached to the offense; and, further, having a rtght to marry there, he could not, while there, violate the statutes of Massachusetts against polygamy. It was therefore held that the children were legitimate, their settlement to be where that of their father was, and the town entitled to recover for their support. The circumstances of Putnam v. Putnam, 8 Pick. 433, are singularly like those before us; and it was held that although the second marriage was a clear case of evasion of the laws of the Commonwealth, it was valid upon the general rule referred to in the cases already cited. The court also says: "If it shall be found inconvenient or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another State, which, if entered into here, would be void, shall have no force within this Commonwealth." There is thus recognized a necessity, discussed earlier in this opinion, for express legislation, if the citizen is to be held bound by the laws of his State for acts performed by him outside its limits. Legislation to this end was afterwards had. Rev. Stats, of Mass.. ch. 75, sec. 6; Tenn. St., ch. 106, sec. 6. Referring to provisions of the act making void marriages between certain parties, or by persons in prescribed conditions, or under certain circumstances, it declares, "where persons, resident in this State, in order to evade the preceding provisions, and with an intention of returning to reside in this State, go into another State or country and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this State." It is not necessary to consider the extent or scope of this statute, It has been discussed by the courts of this State, and is said by Dewey, J., in Commonwealth v. Hunt, 4 Cush. 49, "to have been intended to meet this class of cases—that is, of individuals fraudulently attempting to evade the laws of Massachusetts, so far as respects persons divorced for adultery--and to declare such marriages by the guilty party to be void in this Commonwealth;" or, as Hubbard, J., says, in Sutton v. Warren, 10 Metc. 453: "The only object of this provision is, as stated by the commissioners in their reports, to enforce the observance of our own laws upon our own citizens, and not suffer them to violate regulations founded in a just regard to good morals and sound policy." We have no law in relation to this subject similar to that of Massachusetts, or our statutes before cited, in reference to duelling and treason. There is nothing in the statute to indicate an intention of the legislature to reach beyond the State to inflict a penalty. Nor can I discover an intent to so impress the citizen with the prohibition as to make an act which is innocent and valid where performed an offense when he returns to this State, and himself a criminal for performing it. Every presumption is against such intention. The respondents rest their case upon the general words of the statute. These, taken in their natural and usual sense, would undoubtedly embrace the case of the appellant. "No second * * * marriage shall be contracted by any person during the life-time of any former wife of such person." "Every such marriage shall be absolutely void." "No defendant convicted of adultery shall marry again until the death of the complainant." Equally broad are the provisions of the criminal law, declaring the punishment of the offender. They would comprehend every second marriage wherever celebrated, and take in the citizens of every State. It can not be denied that they are subject to explanation and restraint (Mosher v. People, *supra*), and the principle upon which it rests shows the criminal law to have no application to a marriage out of the State. The same rule was applied in Sinis v. Sinis, 75 N. Y.

466, where, after a very full discussion of the question involved, it was decided that the provision of the Revised Statutes (2 R. S., 701, sec. 23), declaring a person sentenced upon a conviction of a felony to be incompetent as a witness, does not apply to a conviction in another State; that it has reference only to a conviction in this State. The conviction was in Ohio. It was assumed that the convict would have been incompetent as a witness in that State. Suppose a judgment here followed his evidence, and it was afterwards prosecuted in Ohio. Would it be competent in defense to show that it was obtained upon evidence inadmissible by the laws of Ohio? Clearly not. And the reason is stated in the case cited. "The disqualification is in the nature of an additional penalty following and resulting from the conviction, and can not extend beyond the territorial limits of the State where the judgment was pronounced." He was, therefore, a competent witness in the State of New York. There is, in principle, a close analogy between the case I have supposed and the one before us. In each there is personal disqualification—in one, to marry; in the other, to testify. In neither case does the disqualification arise from any law of nature or of nations, but simply from positive law. Each deprived the offender of a civil right. Now in case of the witness, his testimony results in a judgment, a contract of record, to which, when it reaches Ohio, full effect must be given, and for its enforcement the machinery of the law in that State put in motion. In the other case, that in hand, a contract is entered into by the offender, which is a good contract under the laws of the State where made. If so, it should also follow that to each party thereto and to their issue every right and privilege growing out of the relation so established must attach. When, therefore, they return to this State with the evidence of that contract, can the courts do more than in the other case? Are they not limited to the inquiry whether the contract was valid in the State where made? And if it was, how can they deny to the child its inheritance? Let me go a little further. Suppose, on the day the decree of divorce was granted, Barker had also been convicted and sentenced for felony. He would then have been subject only to the statutes above cited, but to that other which declares "that no person sentenced upon a conviction for felony shall be competent to testify in any cause." 3 R. S. 701, sec. 23. Disqualified, therefore, to marry or to testify, he does both in Connecticut, brings back to this State the judgment record and the marriage contract. If the first can not be impeached because of his sentence, neither, as it seems to me, can the other because of his "conviction." And for the same reason—viz., that stated by Greenleaf as the result of the weight of modern opinion, sanctioned by this court in Sinis v. Sinis, *supra*, that personal disqualifications, arising, not from the laws of nations, but from positive laws, especially such as are of a penal nature, are strictly territorial, and can not be enforced in any country other than that in which they originated.

Second. Nor are we in the absence of express words to that effect, to infer that the legislature of this State intended its law to contravene the *jus gentium*, under which the question of the validity of a marriage contract is referred to the *lex loci contractus*, and which is made binding by consent of all nations. It professedly and directly operates on all. To impugn it is to impugn public policy. And while each country can regulate the *status* of its own citizens, until the will of the State finds clear and unmistakable expression, that must be controlling. "Where," says Marshall, C. J. (United States v. Fisher, 2 Cranch, 380), "rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

Our conclusion is that as the marriage in question was valid in Connecticut, the appellant, Rose Van Voorhis, is a legitimate child of Barker, and as such entitled to share in the estate of the testator.

The judgment should be reversed, and a new trial granted, without costs to the plaintiffs or Sarah A. Brintnall, but with costs to the appellant, Rose Van Voorhis, and to respondents, Ella and Elias, to be paid out of the estate.

All concur, except FOLGER, C. J., not voting.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

CONSTITUTIONAL LAW — ILLINOIS — PASSAGE OF A LAW.—Under the provisions of the Illinois Constitution, a bill passed by both houses and presented to the governor before the legislature adjourns, becomes a law, if signed by the governor within ten days from its presentation to him, although the legislative session may in the meanwhile have been terminated by adjournment. Affirmed. In error to the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Chief Justice WAITE.—*Town of Seven Hickory* v. *Ellery*.

PATENT—STEAK BROILER.—The patent issued July 14, 1868, for an improved apparatus for broiling steak by gas, which consisted of an upright cylinder, containing on the diameter of its base a horizontal trough filled with a non-conductor of heat, and which admitted of cooking both sides of a steak simultaneously, was not anticipated or invalidated for want of novelty by Teller's patent No. 66,911, dated July 16, 1867, which did not admit of broiling the steak equally

and simultaneously on both sides; or by Shaw's cooker, which similar to Lazear's patent in some respects, was not specially adapted for broiling steak, and did not accomplish the results attained by Lazear's patent, or by Shaw's patent No. 28,-781, dated June 19, 1860. Reversed. Appeal from the Circuit Court of the United States for the District of Massachusetts. Opinion by Mr. Justice WOODS.—*Sharp v. Dover Stamping Co.*

CONGRESSIONAL LAND GRANT — RAILROAD RIGHT OF WAY.—1. The act of Congress of July 23, 1866, granting certain lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad, construed to be a grant *in præsenti*, and to vest the right of way in the railroad from the date of the passage of the act, and not merely from the date of the location of the road, and that subsequent settlers on the land granted took subject to this right of way. 2. *Semble*, that where Congress has conferred on a railroad of a State a right of way over the public lands in a Territory, the State subsequently created out of that Territory can not prevent the enjoyment of the right previously conferred on the corporation. Reversed. In error to the Supreme Court of the State of Nebraska. Opinion by Mr. Justice FIELD. —*St. Joseph, etc. R. Co. v. Baldwin.*

IMPORT DUTY—TARIFF ACT, JUNE 30, 1864.—Goods substantially made of silk will be treated as silk commercially, unless it directly appears that commerce has given another name to the admixture. Affirmed. In error to the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Chief Justice WAITE. —*Swan v. Arthur.*

MUNICIPAL CORPORATION — CONSTITUTIONAL LAW.—The act of the Nebraska legislature of February 2, 1875, "authorizing school district No. 56 of Richardson county, to issue bonds for the purpose of erecting a school building, procuring a site therefor, and for setting apart a fund to pay for same," is in conflict with section 1 of article 8 of the Constitution of the State, forbidding the passage of special acts conferring corporate powers, and is void. Reversed. In error to the Circuit Court of the United States for the District of Nebraska. Opinion by Mr. Justice MILLER.—*School District v. St. Joseph Fire and Marine Ins. Co.*

DECREE BY CONSENT—PLEADING—MATTER OF DEFENSE.—1. The parties to a decree by consent, for the appointment of a receiver, will not be heard to complain of such decree in the appellate court. 2. Where a deed gave the right to foreclose a mortgage on some water-works, "provided, the failure to pay is not caused by the city" in which they are located, the bill to foreclose need not allege that failure to pay was not caused by the city; but that is a matter for the defendant to set up. Affirmed. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Opinion by Mr. Justice MILLER.— *Little Rock Water Works Co. v. Barret.*

ADMIRALTY—COLLISION—MUTUAL FAULT.—Two steamers *held* mutually in fault for a collision, the one for not giving timely notice by whistles of a change of course, and the other for not slowing down and taking proper precautions to avoid the collision after it was seen to be imminent. Affirmed. Appeal from the Circuit Court of the United States for the Eastern District of New York. Opinion by Mr. Chief Justice WAITE.— *Steam Towboat Line v. Caleb.*

MUNICIPAL CORPORATION—PLEADING.— The principal question raised in this case by the assignment of errors is as to the sufficiency of the first and second counts of the declaration. These counts are upon certain bonds alleged to have been made and executed by the township of Lincoln, in the county of Berrien, and State of Michigan, in aid of a railroad company; and the objection made to them is, that they do not aver that an election was held, to authorize the issue of the bonds, as required by law, and do not aver various other prerequisites to such issue. The question is whether the omission to make these amendments is error. *Held*, after a verdict upon the issues presented, the omission of the declaration to state the holding of the election, and the occurrence of the other preliminary facts which the law required to precede the issuing of the bonds, can not be regarded as error. Affirmed. In error to the Circuit Court of the United States for the Western District of Michigan. Opinion by Mr. Chief Justice BRADLEY.—*Township of Lincoln v. Cambria Iron Co.*

MUNICIPAL CORPORATIONS — CANCELLATION OF COUNTY WARRANTS—CONSTITUTIONAL LAW. —This was a suit on county warrants. The defense was that, on January 4, 1876, the county court made an order, in conformity to the act of the Arkansas legislature of January 6, 1857, calling in all the outstanding warrants of the county, including those sued on in this case, for the purpose of examining, canceling and reissuing the same, fixing Friday, the 7th day of April of that year, as the limit of time for the presentation of warrants: *Held*, that the law was a valid law, as it was merely intended to expedite and make safe the keeping of the county accounts, and did not intend, by giving the county court authority to make such an order, to deprive the Federal courts of their jurisdiction, and that such order was valid and binding on the plaintiff in this case, even in a suit in the Federal court. Reversed. In error to the Circuit Court of the United States, for the Eastern District of Arkansas. Opinion by Mr. Justice MILLER.—*Ouachita County v. Wolcott.*

PATENT—SURRENDER FOR RE-ISSUE — CANCELLATION.—1. Prior to the revision of the patent laws in 1870, a patent surrendered for re-issue is canceled in law, as well when the application for re-issue is rejected, or decided against the patentee in a declaration of interference, as when it was granted. 2. It seems also

that under the revision of the patent laws of 1870, where the title of the patentee is disputed and decided against him, the original patent is thereby avoided. Affirmed. In error to the Court of Appeals of the State of New York. Opinion Mr. Justice BRADLEY.—*Peck v. Collins.*

MINES AND MINING — CONSTRUCTION OF A COMPROMISE AGREEMENT BETWEEN ADJOINING MINE-OWNERS. — A compromise between two mining companies, by which a certain line was established which neither could cross, construed to mean that the line was to be extended through the property to the center of the earth in a plane. Affirmed. In error to the Circuit Court of the United States for the District of Nevada. Opinion by Mr. Chief Justice WAITE. — *Richmond Mining Co v. Eureka Consolidated Mining Co.*

WAREHOUSE RECEIPT—FACTOR'S PLEDGE.—1. Under the Louisiana statute of March 11, 1876, which seems to be substantially a mere affirmation of the previous unwritten law factors, can not pledge merchandise of a consignor for their own purposes, or pass the title thereto by a warehouse receipt, except to the extent of their interest therein; but the owner may recover the property from the pledgee, unincumbered by the pledge. 2. And the warehouseman, being a mere custodian, and not a guarantor of the title, is not liable to the pledgee to whom the warehouse receipt has passed, after having notified the pledgee, when deprived of the merchandise by judicial process issued by its rightful owner, and requested the pledgee to defend the suit. Affirmed. In error to the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Chief Justice WAITE. —*Mechanics, etc. Ins. Co. v. Kiger.*

SUPREME COURT OF GEORGIA.

September, 1881.

INJUNCTION—CONTEMPT OF COURT—ATTORNEY AN "AGENT."—Where an injunction was granted against a defendant, his servants, agents and employees, restraining them from interfering with the possession, use and enjoyment by complainant of a certain house, an attorney who represented the defendant on the hearing, and who had notice of the injunction, was bound thereby; and he could not, by virtue of subsequent employment by other parties claiming the house, take possession of the same or put others in it. Having done so, an order requiring him to remove the tenants put in the house by him and return the same to the complainant or his agents, by a specified time, or in default that he be imprisoned until he should do so, was right. Judgment affirmed. Opinion by JACKSON; C. J.—*Phinizy v. Wimpy.*

INJUNCTION—ATTACHMENT FOR CONTEMPT.—1. The power to attach for contempt for violating an injunction is absolutely essential to the effectiveness of the injunction itself. Hence a proceeding for that purpose is so connected with the injunction as that a decision upon it may be brought to the Supreme Court by a "fast" writ of error. 2. A chancellor has wide discretion in respect to attachments for violating injunctions, and his decision will not be reversed unless that discretion is grossly abused. It is not so in this case. Judgment affirmed. Opinion by JACKSON, C. J.—*Hayden v. Phinizy.*

PARTIES—AMENDMENT—PRESCRIPTIVE TITLE TO REAL ESTATE—BROKEN POSSESSION.—1. A suit brought by one as heir-at-law may be amended so as to become a suit by him as executor. (*a*). That there are other heirs makes no difference; the executor represents all parties in interest. 2. Such an amendment relates back to the filing of the original suit, and if the original action was not barred, the amendment will not be barred. 3. Where one holding land permissively, under bond for titles, conveyed it absolutely (the vendee taking possession), and subsequently rebought from his vendee and resold to another vendee, the adverse possession was broken, and the possession of the first and last vendees could not be tacked so as to make a good prescriptive title against the original holder of the title. (*a*). It makes no difference that the first vendee remained in actual possession from the time of his reconveyance until the second vendee took possession, he having done so not under claim of right in himself, but under his vendor to whom he had reconveyed. 4. That a vendor who has given bond for titles has sued and recovered a judgment for the balance of the purchase-money, will not bar a subsequent suit in ejectment for the land. He is not compelled to file a deed and levy on the land. 5. *Quære*: Is one whose vendor has only a bond for titles to land, and who makes no effort whatever to discover the nature of his title, entitled to equitable protection as a *bona fide* purchaser? Judgment affirmed. Opinion by JACKSON, C. J.—*Hines v. Rutherford.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

46. In 1869 M sold to A 120 acres of land and executed his bond conditioned that upon the payment of the balance of the purchase-money, he would deliver to A warranty deed to said land. For the unpaid purchase-money A executed his two notes for $800 and $600, and payable in four and seven years respectively. Subsequently, in the same year, M assigned the former note to G, and as collateral security for the

payment of the same, executed to G a deed of trust on another tract. In 1875 G brought suit against A to enforce his vendor's lien for the payment of said note, but before judgment was rendered, J becoming the assignee of the latter ($600) note, prevailed on A to secure the same by a deed of trust on the first-mentioned tract. G obtains judgment, has the 120 acre tract sold and becomes the purchaser at the price of ten dollars per acre. Shortly afterward, J sold the same property under his deed of trust, and became the purchaser for the sum of twenty dollars per acre. G took possession under his deed. Now J, claiming title under the trustee's deed, brings a suit of ejectment against G. The latter sets up an equitable defense. Should plaintiff be permitted to file an equitable reply? If so, what should be the decree of court? Please cite authorities. X.

Kahoka, Mo.

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47. A township trustee under the statute in Indiana, is required to rent the school section 16, and to report and pay over the rents to the county treasurer, to be distributed by the treasurer to the schools of the congressional township in which the land is situated. The trustee failed to pay the rents to the treasurer, and the statute required the board of county commissioners to cause an action to be instituted against the trustee, to recover the money. An action was instituted by the commissioners, who employed counsel to prosecute the action. The case was tried in the circuit court, and judgment was rendered in favor of the commissioners. The trustee appealed to the Supreme Court of the State, where the case was affirmed. He also appealed to the Supreme Court of the United States, where it was again affirmed. Counsel for the commissioners collected a part of the judgment, and applied the same on attorney fees for prosecuting the action. The attorney-general of the State has instituted an action against the commissioners of the county, to recover the money applied by their attorneys on their fees for the prosecution of the suit. Section 3 of article 8 of the Constitution of Indiana, provides that "the principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever." The statute provides "that the income of congressional school lands shall be denominated the school revenue for tuition, the whole of which is hereby appropriated and shall be applied exclusively to furnishing tuition to the common schools of the State, without deduction for the expense of collection or disbursement." The question is, whether this fund sued for and collected of the trustee should not bear the expense of attorney fees? The statute clearly refers to the ordinary fees of officers, and prevents any deduction for the payment thereof; and does not refer to the extraordinary expenses of collecting by action, where suit is necessary; and I think that the statute and Constitution refer to the net fund after deducting the necessary extraordinary expense of collection. Is there any decision construing a similar Constitution and statute? H.

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48. Will some of the legal lovers of Shakespeare tell us what title passed to Goneril when Lear said to her: "Of all these bounds" (describing them), "we make thee lady; to thine and Albany's issues be this perpetual." And what title passed to Regan when Lear said to her: "To thee and thine hereditary ever, remain this ample third of our fair kingdom." When Lear gave the crown and said: "This coronet joint between you," was it a livery of seizin? H.

Port Huron, Mich.

QUERIES ANSWERED.

Query 43. [13 Cent. L. J. 359.] A sells a farm to B, giving a warranty deed, and receives back a mortgage for a large part of the purchase-money. Before foreclosure, C, who claims under an adverse title, brings ejectment against B. Under the laws of Michigan the mortgagee is not entitled to possession till after foreclosure. Is A entitled to appear and defend the ejectment suit with B, or if B suffers default, or fails to properly defend, can A appear and defend in his own right, to protect himself? If judgment passes against B, A not defending, is A bound on his warranty? Would such a judgment bar the mortgage? M.

Port Huron, Mich.

Answer. I refer "M" to Marion v. Kellogg, 38 Mich. 132. W.

Port Huron, Mich.

Query 40. [13 Cent. L. J. 318.] Supposing there are eleven passenger cars and one locomotive going from a certain place, and only one conductor, three brakemen and one officer aboard the whole train of cars, which are full of passengers, and one passenger is assaulted and beaten by a gang of passengers (ruffians), can the passenger assaulted hold the company liable? On the said car where the passenger was, and was assaulted and beaten, there was no conductor or officer to protect the passenger, who called out for aid to help him, in that particular car. Not until a long while afterwards were the passengers arrested who assaulted him, and who were afterwards convicted of the crime. A. K.

New York.

Answer. Carriers of passengers are bound to exercise the utmost care to protect their passengers from violence of whatever description, and are liable for negligence in exemplary damages. Flint v. Norwich Transportation Co., 34 Conn. 554; Philadelphia R. Co. v. Derby, 14 Howard, 468; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365. In the case of the New Orleans, etc. R Co. v. Burke, 53 Miss. 200, the railroad company was held liable for injuries inflicted upon Burke by fellow passengers, the court saying that it was the duty of the conductor to stop the train and summon to his aid the train men and make every effort to stop the rioting, and, if necessary to eject the rioters, and that not to do so constituted such negligence on the part of the carrier as would allow a recovery against it. This is a well reasoned and ably considered case. See, also, Pittsburgh R. Co. v. Hinds, 53 Pa. St. 512; Goddard v. Grand Trunk R. Co., 57 Me. 202. Gross neglect of duty, especially if the duty is of a public nature, is sufficient ground upon which to warrant the finding of exemplary damages. Mississippi, etc. R. Co. v. Whitfield, 44 Miss. 466; Vicksburg R. Co. v. Patton, 31 Miss. 156; Goddard v. Grand Trunk Ry., 57 Ind. 202. B. B. BOONE.

Mobile, Ala.

Query 30. [13 Cent. L. J. 219.] Where a married woman holds a statutory separate estate, with full power to sell and convey the same jointly with the husband, under a statute requiring her to acknowledge the deed upon a private examination separate and apart from her husband in the mode pointed out by the statute—can she appoint and constitute an attorney in fact to execute the deed for her? And if so,

shall she execute the power of attorney jointly with her husband and upon a private examination as required in the execution of the deed? Then, will this dispense with the certificate of acknowledgment on a private examination to the deed. G. E. H.
Washington, D. C.

Answer. G. E. H. will be answered by reference to Shanks v. Lancaster, 5 Gratt. 110, and 2 Minor's Institutes, 984, *et seq.* H.
Wheeling, Va.

Query 42. [13 Cent. L. J. 339.] Eighty acres of land was deeded to A and B. husband and wife, forty acres of which is exempt as a homestead; can C, a creditor of the husband, levy upon and sell, under an execution, the other forty acres? Attorney.
Grand Rapids, Mich.

Answer. At common law if an estate is granted to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered one person in law, they can not take the estate by moities; both are seized of the entirety, *per tout* and not *per my*; neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor, and when the statute gives to the wife her separate estate, the husband has not such an interest as is subject to sale on execution. Davis v. Clark, 26 Ind. 424; Arnold v. Arnold, 30 Ind. 305; Falls v. Hawthorne, 30 Ind. 444; Simpson v. Rearson, 31 Ind. 1; Chandler v. Cheney, 37 Ind. 391; Jones v. Chandler, 40 Ind. 588; Anderson v. Tannehill, 42 Ind. 142; McConnell v Martin, 52 Ind. 434; Hulett v. Inlow, 57 Ind. 412; Patton v. Rankin, 68 Ind. 245; Fisher v. Provin, 25 Mich. 347; Hemingway v. Scales, 42 Miss. 1. When the husband is entitled to the possession and usufruct of the wife's real estate during marriage, the husband's interest during his life, at least, may be sold on execution. 5 Cent. L. J. 530. In McCurdy v. Canning, 64 Pa., it was held that a purchaser at sheriff's sale under a judgment against the husband, of his interest in an estate held with his wife by entirities, can not recover possession during the wife's life. 10 Amer. Law Reg. (N. S.) 547. In Meeker v. Wright, 76 N. Y. 262, it was held that since the passage of the act of 1860, concerning the rights and liabilities of husband and wife, where lands have been conveyed to a husband and wife jointly, without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common. Francis T. Hord.
Columbia, Ind.

RECENT LEGAL LITERATURE.

Benjamin's Chalmers' Digest. A Digest of the Law of Bills of Exchange, Promissory Notes and Checks. By M. D. Chalmers, M.A. of the Inner Temple, Barrister-at-Law. Re-written and Adapted to the Law as it exists in the United States. By W. E. Benjamin, A.M. Chicago, 1881: Callaghan & Co.

This book, as it comes to us, is an attempt, and upon the whole, a successful attempt, to state the law of negotiable paper in the form of the Indian Codes of Sir James Stephen, and which was also adopted in his digests of the Law of Evidence, and of the Criminal Law; and also by Mr. Pollock in his Law of Partnership, and Mr. Dicey in his work on Domicil. This method of treating a legal subject is thus aptly described by the English author in his Introduction: "A general proposition is first laid down. Qualifications or less obvious deductions, when of sufficient importance, are next stated in the form of explanations. Then come the exceptions, if any. These abstract propositions are illustrated, when necessary, by examples showing their application to particular states of fact. Each general proposition, with its accompanying 'explanations' and 'exceptions,' forms a separate article." The law of negotiable paper is a fortunate subject for this treatment, because of the fact that it is more fully developed, and its cardinal propositions more distinctly settled, than many other branches of jurisprudence. The favor with which books upon this plan have been received by the profession, forms in itself no contemptible argument in favor of a general codification.

Book of Deeds. The Book of Deeds, containing Forms of Deed for each State and Territory, with full Acknowledgments for Husband and Wife. By Edward H. Williamson, Conveyancer. Philadelphia, 1881: T. & J. W. Johnson & Co.

This neat little volume of forms will be found extremely useful by those members of the profession who have occasion to draw mortgages, powers, etc., concerning lands in other States, and will save much time and labor. The forms, at least as far as concerns those States with the statutes of which pertaining to conveyancing we happen to be acquainted, seem to be very carefully framed, and are singularly free from the surplus verbiage with which published forms, otherwise excellent, are frequently disfigured.

A Manual for Guardians and Trustees of Minors, Insane Persons, Imbeciles, Idiots, Drunkards, and for Guardians *ad litem*, resident and non-resident, affected by the Laws of Ohio. With Forms, Notes of Decisions and Practical Suggestions. By Florien Glaque. Cincinnati, 1881: Robert Clark & Co.

This book, as indicated by the title, is local in its scope, and is intended for the use of the profession and guardians and trustees in Ohio. It is an attempt, as indicated in the preface, to gather "within a small compass and convenient form the widely scattered statutory provisions, and at least the more important general principles of unenacted law, and notes of decision, pertaining to the subject, with suitable references to the authorities relied on," in such form as to be "a great convenience to even the most experienced attorneys and officers of courts having access to the best libraries, to say nothing of the less favored and less experienced, nor of other persons directly interested who can not have an attorney constantly within reach for consultation." And from a cursory examination it certainly appears to us that the attempt has been a successful one, and that the work will be one of considerable utility to the profession of the State of Ohio.

The mechanical execution of the volume is fair though there is room for improvement in the matter of proof-reading.

NOTES.

——Whether Guiteau is responsible for the assassination of the President or not, it is obviously of great interest to the community that the question should be thoroughly sifted—not only for the sake of the proper administration of justice, but to determine the *status* in the community of the class to which Guiteau belongs. There is probably little doubt in most people's minds that Guiteau will be found guilty; but it would be a pity if he were found guilty as a sort of foregone conclusion, without a full and exhaustive presentation of his grounds of defense. The case on both sides ought to be laid before the jury by the ablest counsel in the country; neither Mr. Corkhill nor Scovill has sufficiently high professional standing to attempt the task by himself.—*New York Nation.*

——"No one who has a proper appreciation of the intrinsic dignity of the profession of the law can look upon the spectacle of the American bar, as a body, shrinking from all contact with Guiteau's defense without a feeling of amazement and a blush of shame. I yield to no man in my abhorrence of the crime of murder, but I was trained in a school which held that the true lawyer, like St. Bernard's monks, should be ready to face even the avalanche in the discharge of his duty. Gen. Butler, in his letter to Mr. Scoville, has eloquently expressed this in words, but Brougham, when he faced the anger of a king in Queen Caroline's case; Mr. Phillips, when he derided the howling of a mob in the case of Courvoisier; and Malesherbes, when he upheld the law for Louis XVI. under the eye of Robespierre and the shadow of the guillotine, practiced what the general only preaches. All modern civilized codes demand justice and fair play even for the vilest, and, as Pliny says, 'Patience is a very considerable part of justice.' Many say this is not the time to exercise anything but the swift wrath of an outraged people. But to these unthinking ones the answer of Richelieu is most apt: 'For justice, good my liege, all place is a temple, and all seasons summer.'" — *A Correspondent in the New York Sun.*

——From official statistics recently collected and printed in a special paper by the Howard Association, it would appear that there is a special difficulty in enforcing the extreme penalty of the law, and they give the following examples: In Australia, during the decade 1870-79, there were sentenced to death for murder 806 persons, of whom only 16 were executed; in France, during the same decade, 198 persons were sentenced to death, of whom 93, or less than a half were executed; in Spain, decade 1868 to 1877 (latest return), 291 were sentenced to death and 126 executed; in Sweden (1869-1878) 32 were sentenced to death, only 3 were executed; in Norway (1867-1878) 14 were sentenced to death, only three were executed; in Denmark (1867-1877) 94 were sentenced to death for murder, only 1 was executed; in Bavaria (1870-1879) 249 were committed for murder, 7 were executed; in Italy there were about 1600 homicides per annum, followed by few executions or other severe punishments; in Germany (North) during the decade 1869-78, 1301 persons were convicted of homicidal crimes, of whom 484 were sentenced to death and 1 executed (Hodel); in the United States about 2,500 murders per annum were committed, with 100 executions and 100 "lynchings" per annum. The "lynchings" occur almost exclusively in the States which retain capital punishment by law. In Australia and New Zealand during a recent decade, there were 453 sentences to death, followed by 123 executions. With respect to England and Wales, in the 30 years, 1850 to 1879 inclusive, there were 2,005 persons committed for trial for wilful murder, of whom 665 (33 per centum) were executed. The proportion of convictions in England for non capital crimes averaged 76 per centum, showing, it was argued, how much easier it was to secure conviction and punishment where the irrevocable penalty did not interpose its peculiar difficulties. In Ireland during the last 20 years, 66 were sentenced to death, and 36 (54 per centum) executed; and in Scotland during the same 20 years, 40 were sentenced to death, and 15 (nearly 38 per centum) executed. The association further shows that during the last twenty-five years the most serious crimes of this country have materially diminished, and especially those which were formerly capital. In respect of countries which have abolished capital punishment, it is said that "experience now, extending over many years, shows this result in general—that wherever the capital penalty has been substituted by a severe secondary punishment, enforced with comparative certainty and under common sense conditions, murders have not increased, but the certainty of conviction and punishment has increased."—*London Times.*

——A subscriber writes: "I send you below an exact copy, omitting the name of the attorney, of a motion made before a justice of the peace in an attachment case in Calhoun County, Iowa: 'In justice court before Wm. Brown, a justice of the peace in and for Sherman township, Calhoun County, Iowa. Harvey & Osborne, plaintiffs, v. G. S. Hollenbeck, defendant.—Motion to quash. The defendant moves the court to quash so mutch of the writ of attachment and the property writes moneys & credits levid upon as is in exsess of fifty per cent. of the demand in the above cause that all the said property writes & monies and credis over & above fifty per cent. shall be at once released and returned to Def't. ——atty for Def't."